No. 88-2045

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

GUY GRIDER,

Plaintiff/Petitioner,

v.

TEXAS OIL & GAS CORP., et al.,

Defendants/Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Guy Grider ("Grider") sought relief under "Civil RICO" (18 U.S.C. § 1961, et seq.) for substantial injuries suffered by reason of a pattern of fraudulent activity engaged in pursuant to two successive, but interrelated schemes by oil and gas well operators to defraud Grider and others, who owned working interests in the oil and gas wells. The District Court held that to state a claim for relief under 18 U.S.C. § 1962(a) (deriving income from a racketeering activity plus investment or use of that income), Grider had to be injured by the "use or investment" of the "income" derived from the pattern of fraud rather than the fraudulent acts themselves. In addition, the Court held that Grider had to be able to recover for a violation of 18 U.S.C. § 1962(a)

before he could recover for an overt act that injured him under 18 U.S.C. § 1962(d) (conspiracy to violate § 1962). As such, it dismissed Grider's claim for relief. The Court of Appeal for the Tenth Circuit affirmed.

These actions raise two important questions under Civil RICO, to wit:

1. Did Grider state a claim for relief under 18 U.S.C. § 1962(a) which prohibits "any person" "receiv[ing]" "income" from a "pattern of racketeering activity," in which he "participated as a principal," from "us[ing]" or "invest[ing]" the "income" in an "enterprise," and 18 U.S.C. § 1964(c) which grants to "a person" "injured" by "a violation" of § 1962(a) a claim for relief?

2. Did Grider state a claim for relief under 18 U.S.C. § 1962(d) which

prohibits "conspirac[ies]" to "violate" § 1962(a), and 18 U.S.C. § 1964(c) which grants a "person" "injured" by "a violation" of § 1962(d) a claim for relief?

LIST OF PARTIES

The Petitioner is Guy Grider.

The Respondents are Texas Oil & Gas Corporation, a Delaware corporation, TXO Production Corporation, a Delaware corporation, Ratliff Exploration Company, an Oklahoma corporation, Ratliff Drilling Company, an Oklahoma corporation, Diversified Oil and Gas Exploration, Inc., an Oklahoma corporation, Diversified Well Servicing Corporation, an Oklahoma corporation, Barton W. Ratliff and Jim D. Brewer.

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OPINIONS BELOW

The Court of Appeals' opinion is reported at 868 F.2d 1147 (10th Cir. 1989). It is reproduced at App. pp. 1-16. An Order on Rehearing was issued March 21, 1989 and it is reproduced at App. pp. 17-20. The District Court opinion is not reported; it is reproduced at App. pp. 21-61.

JURISDICTION AND DATE OF JUDGMENT BELOW

Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Court of Appeals' judgment was entered on January 4, 1989. A petition for rehearing and a suggestion for rehearing en banc was timely filed. It was denied on March 21, 1989. This Petition for a Writ of Certiorari is timely filed pursuant to 28 U.S.C. § 2101(c) and Rule 20.4 of the Supreme Court Rules.

STATUTORY PROVISION INVOLVED

Title 18, United States Code, in relevant part, provides:

> § 1961. Definitions.
>
> As used in this chapter--
>
> (1) "racketeering activity" means . . . any act which is indictable under . . . 18, United States Code: . . . section 1341 (relating to mail fraud) . . .
>
> x x x
>
> (3) "person" includes any individual or entity capable of holding a legal or beneficial

interest in property;

(4) "enterprise" includes any . . . corporation . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived . . . from a pattern of racketeering activity . . . in which such person has participated as a principal . . . to use or invest . . . such income . . . in . . . the operation of . . . any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

x x x

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection . . . (a) of this section.

§ 1964. Civil remedies.

x x x

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

84 Statutes at Large 947 (1970), provides:

> The provisions of . . . [RICO] shall be liberally construed to effectuate its remedial purposes.

STATEMENT OF THE CASE

Guy Grider, a working interest owner in oil and gas wells, sought relief under Civil RICO (18 U.S.C. § 1961, et seq.) for substantial injuries suffered by reason of a pattern of fraudulent activity engaged in pursuant to two successive, but interrelated schemes by oil and gas well operators and others to defraud Grider and others.

Jurisdiction of the District Court rested on 18 U.S.C. §§ 1964(a), 1964(c); 28 U.S.C. §§ 1331(a), 1337. The schemes to defraud were executed through multiple instances of mail fraud (18 U.S.C. § 1341); they had a common purpose: the

operation of oil and gas wells in a manner by which the operators would receive much larger-than-rightful profits by taking much smaller-than-rightful risks.[1]

The District Court granted the Defendants' motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief. The District Court held that for Grider to state a claim for relief under Section 1962(a) (receiving income from racketeering acts plus use or investment of that income), he must be "injured" by the "use or investment" of

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[1] Grider also sought relief for related common law theories, including breach of contract and fiduciary duties, negligence, conversion, actual and constructive fraud, negligent misrepresentation, civil conspiracy, money had and received, unjust enrichment, and action in accounting.

the proceeds of the fraud rather than the acts constituting the fraud. The District Court also held that to state a claim for relief under Section 1962(d) (conspiracy), Grider also had to be able to recover under Section 1962(a).

Grider appealed to the United States Court of Appeals for the Tenth Circuit. He made three distinct arguments:

1. A violation of 18 U.S.C. § 1962(a) (receiving income from racketeering acts plus use or investment of that income) occurred; he was injured by the racketeering acts that were an element of the violation; and that was all that 18 U.S.C. § 1964(c) (recovery for injury by violation) required to state a claim for relief under Civil RICO;

2. A violation of 18 U.S.C. § 1962(a) (receiving income from racketeering acts plus use or investment of that income) occurred; he was injured by the use of the income

from the racketeering acts that were an element of the violation; and that, too, was sufficient under 18 U.S.C. § 1964(c) (recovery for injury by violation) to state a claim for relief under Civil RICO; and

3. A conspiracy to engage in a violation of 18 U.S.C. § 1962(a) existed that violated 18 U.S.C. § 1962(d); he was injured by overt acts engaged in pursuant to that conspiracy; and that, too, was sufficient under 18 U.S.C. § 1964(c) (recovery for injury by violation) to state a claim for relief under Civil RICO, independent of his right to recovery for injury from racketeering acts or use of the income under 18 U.S.C. § 1962(a).

The Tenth Circuit affirmed. 868 F.2d 1147. The Court observed that in one scheme "certain of the defendants reduced [Grider's] revenues by illegally venting natural gas, stole natural gas from the wells for drilling operations,

sold gas without paying [Grider] the appropriate revenue, unlawfully fixed prices, double-billed [Grider], and mishandled an escrow account to [Grider's] detriment." Id. at 1148. The Court also observed "that in the second scheme various defendants breached their fiduciary duty to [Grider], conspired to fix prices, failed to pass on [Grider's] share of rebates and discounts, mishandled an escrow account, double-billed [Grider], billed [Grider] for nonexistent goods and services, and withheld [Grider's] share of production revenues." Id. The Court then held that injury by racketeering acts under Section 1962(a) does not give rise to a claim for relief under Section 1964(c). In addition, the Court held that absent cognizable injury from a violation of Section 1962(a), injury

from an overt act of a conspiracy in violation of Section 1962(d) does not give rise to a claim for relief under Section 1964(c).

REASONS FOR GRANTING THE WRIT

1. This Court Must Grant Certiorari to Reconcile Conflicting Lower Court Decisions on the Requirement for "Injury" Necessary to State a Claim for Relief Under 18 U.S.C. §§ 1962(a), 1964(c).

Today, the requirements for "injury" to sue under RICO (18 U.S.C. § 1961, et seq.), a statute authorizing criminal and civil sanctions, is the subject of sharply conflicting decisions from the circuit courts of appeal. On the specific issue in the case sub judice, the Tenth Circuit and the Third Circuit have taken one position; the Second Circuit and the Fifth Circuit have taken a contrary position. The district courts,

too, are in hopeless disarray. This split is irreconcilable. Postponement of review will not result in the lower courts working out their differences. The basic arguments are articulated, the lines of differences are drawn, and the positions taken. Parties need to know, however, when RICO claims for relief, now being filed at the rate of approximately one thousand per year,[2] are proper, and lower courts need guidance to maintain uniformity of decision. Before this split causes additional appeals and needless confusion in litigation, litigants, their clients, and lower courts need definitive guidance from this Court.

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[2] Blakey and Cessar, Equitable Relief Under Civil RICO, 62 Notre Dame L. Rev. 526, 622 (1987) ("Equitable Relief").

In 1970, Congress enacted the Organized Crime Control Act, Title IX of which is known as "RICO." 18 U.S.C. § 1961, et seq. It has become the prosecutor's tool of choice in organized crime, political corruption, white-collar crime, terrorism and neo-nazi and anti-semitic hate group prosecutions.[3] District courts, however, reacted with extreme hostility to the private civil bar's efforts to implement the statute. Efforts were made to read into the statute judicial limitations that could not be supported by its text, purpose, or legislative history. This Court rejected those efforts under Civil RICO in Sedima S.P.R.L. v. Imrex Co., 473

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[3] Oversight on Civil RICO Suits: Hearings Before the Senate Committee on the Judiciary, 99 Cong., 1st Sess. 109-11 (1985) (testimony of Assistant Attorney General Stephen S. Trott).

U.S. 479 (1985). The Tenth Circuit's "use or investment" limitation is merely another improper judicial attempt to restrict the scope of the statute. Louisiana Power and Light v. United Gas Pipe Line, 642 F. Supp. 781, 807 (E.D. La. 1986) (the result is to "emasculate the statute with regard to corporate defendants"). See generally Equitable Relief at 585 n.237 (discussion of use only rule). Ironically, in light of the rising tide of white-collar crime in the thrift, securities, commodities, defense procurement, etc. industries,[4] its

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[4] The President, for example, told the Nation on February 6, 1989 that "unconscionable risk-taking fraud and outright criminality . . . [were] factors" that led to the crisis in the savings and loan industry. New York Times, Feb. 7, 1989, p. 31, col. 1. He promised "every effort to recover assets diverted from these institutions and to place behind bars those who caused losses through criminal behavior." (continued)

effect will be to virtually eliminate Civil RICO suits by victims against corporations that engage in patterns of racketeering activity.

Id. The Tenth Circuit's decision in Grider constitutes a potential impediment to fulfilling the President's pledge, as both the FSLIC and FDIC use RICO in carefully selected bank fraud litigation. See, e.g., FSLIC v. Shearson-American Express, 658 F. Supp. 1331 (D.P.R. 1987); FDIC v. Hardin, 608 F. Supp. 348 (E.D. Tenn. 1985). See generally Combatting Fraud, Abuse and Misconduct in the Nation's Financial Institutions: Current Federal Efforts are Inadequate, H. Rep. No. 100-1088, 100th Cong. 2d Sess. 2-13 (1988) (criminal misconduct by insiders major contributing factor in approximately one-third of all commercial bank failures and three-fourths of all thrift failures; loss estimates range from $31 to $80 billion); Office of Comptroller of the Currency, Bank Failures: An Evaluation of the Factors Contributing to the Failure of National Banks (1988) (insider abuse significant factor in thirty-five percent of the bank failures); New York Times, March 11, 1989 p. 17, col. 1 (FSLIC fund liabilities exceed assets by $56 billion, four times the total of a year ago).

White-collar crime, too, is no garden variety problem today; its annual impact is conservatively estimated at $200 billion. Atty. Gen. Ann. Rep. 42 (1985). See Braswell v. United States, 108 S. Ct. 2284, 2294 n.9 (1988) ("the most serious and all-pervasive crime problem in America today") (quoting Rep. Conyers).

In Sedima, 473 U.S. at 495, this Court analyzed Section 1962 and its civil implications under Section 1964(c):

> Section 1964(c) authorizes a private suit by "[a]ny person injured in his person by reason of a violation of § 1962." Section 1962 in turn makes it unlawful for "any person" -- not just mobsters -- to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity. §§

> 1962(a)-(c). If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1964(c). (emphasis added)

The Court added:

> [W]here the plaintiff alleges each element of the violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of the enterprise. x x x RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach . . ., but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes. . . ."

Id. at 497-98. While Sedima, of course, only involved a claim for relief under Section 1962(c), the language and rationale of the Court's opinion is not so limited. Accord, American National

Bank & Trust Co. of Chicago v. Haroco, Inc., 473 U.S. 606, 608-09 (1985) (predicate act injury sufficient under § 1962) (the injury "must flow not from the predicate acts themselves but from the . . . conduct of an enterprise . . . amorphous and unfounded restriction [. . .]"). The Tenth Circuit's holding cannot, therefore, be squared with the text of RICO, particularly its liberal construction clause, or with this Court's unequivocal teachings in Sedima and Haroco, and it should be rejected by this Court before it causes further needless waste of litigation time and expense.

In the Tenth Circuit, litigants are required to allege under Section 1962(a) some injury in addition to injury resulting from the predicate acts of racketeering. The litigant must allege,

according to the Court, that he was injured by the "use or investment" of the income derived from the racketeering activity.[5] To justify this holding as

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[5] In fact, Grider argued:

> [T]he decisions adopting the "investment or use" only rule seem to assume, as did the district court, but largely without careful analysis, that the victim of "racketeering activity" is not separately injured by the investment (or use) of the income (or its proceeds). This view is fundamentally mistaken.
>
> Property, including money, taken by theft or fraud is converted. The victim may sue for fraud or conversion. . . . Any distinct act of dominion over the property, however, is a separate conversion. . . . Unauthorized use of money may be a distinct act of dominion. . . . Accordingly, even the 'investment or use only' rule ought not prevent a victim of a 'racketeering act' that does produce income from bringing suit under Section 1962(a) for its separate investment or use in an enterprise. (Brief (continued)

compelled by the plain language of the statute, the Court sought to draw a distinction between the word "received" used in § 1962(a) and the word "receive." 868 F.2d at 1149. The Court confuses tense with sense.[6] In addi-

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at 36.) (emphases in original; citations omitted.)

inexplicitly, the Court did not respond to Grider's alternative argument of injury by use under Section 1962(a).

It was not necessary for Grider expressly to plead this theory of injury in his Complaint. City of New York v. Joseph L. Balkan, 656 F. Supp. 536, 542 (E.D.N.Y. 1987). The so-called "Theory of the Pleadings Doctrine" does not obtain under Fed. R. Civ. P. 8. C. Wright and A. Miller, Federal Practice and Procedure at § 1219 p. 142 (1965).

[6] In fact, the Court confuses surface syntax with deep structure semantics. See generally G. Leech, Semantics 178-201 (semantics and syntax), 263-290 (semantic equivalence and 'deep semantics') (1974). No difference in meaning is represented by these three syntactically alternative ways of expressing the same semantic idea:

(continued)

tion, in focusing on "use or investment," it ignored the express requirement that the liable "person" be a

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1. If he receives and uses money, then . . . .
2. If he received and used money, then . . . .
3. If he has received money and then uses it, ...

The Tenth Circuit's contrary construction of RICO is bad semantics and worse law.

More than one-hundred years ago, this Court noted, "It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. . . . [By such] a construction [it is possible to] annul[ ] [it] and [render] it superfluous and useless." Pillow v. Roberts, 54 U.S. (13 How.) 472, 475 (1851) (Grier, J.). Such an approach to statutory construction, however, carries with it a heavy price. After a lifetime of study of the law, Dean Roscoe Pound concluded that such construction (1) "tend[ded] to bring the law into disrespect; (2) . . . subject[ed] the courts to political pressure; [and] (3) . . . invite[d] an arbitrary personal element in judicial administration." III R. Pound, Jurisprudence 488 (1959). It threatened, he found, to make "laws . . . worth little" and to "break down" the "legal order" itself. Id. at 490.

principal in the racketeering activity. Section 1962(a) makes unlawful, in short, not only "use or investment," but also racketeering activity.

The Third Circuit, without detailed analysis and merely by following a supposed majority view of the district courts, has now also adopted the use or investment rule. Rose v. Bartle, 871 F.2d 331, 355-56 (3rd Cir. 1989).

After a detailed analysis of the statute and this Court's teachings, the Second Circuit in Banker's Trust Company v. Rhoades, 859 F.2d 1096, 1100 (2nd Cir. 1988), however, squarely refused to impose a special limitation on "injury," and it held that injury from racketeering acts gives rise to a claim for relief under Sections 1962(a)-(d) under Section 1964(c).

Similarly, the Fifth Circuit in Ocean Energy II, Inc. v. Alexander & Alexander, Inc., 868 F.2d 740, 742-48 (5th Cir. 1989) squarely held that injury caused by the acts of racketeering that make up the violation of Section 1962(a)-(d) give rise to a claim for relief under Section 1964(c). See also Brandenburg v. Seidel, 859 F.2d 1179, 1187 (4th Cir. 1988).

The Tenth Circuit's holding in Grider and the Third Circuit's holding in Rose, therefore, conflict with the better reasoned holdings of the Second Circuit in Banker's Trust and the Fifth Circuit in Ocean Energy.

The district courts, too, are not uniform in their approaches or results. A number of them hold that Section 1962(a) is violated, not when income is derived from racketeering

activity, but solely through its use or investment in an enterprise.[7] Similarly, these decisions are generally free of analysis; the courts merely assert the position without reasoning to it.

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[7] See, e.g., Omega Const. Co., Inc. v. Altman, 667 F. Supp. 453 (W.D. Mich. 1987); Cincinnati Gas & Electric Co. v. General Electric Co., 656 F. Supp. 49, 84 (S.D. Ohio 1986); Gilbert v. Prudential-Bache Sec., Inc., 643 F. Supp. 107, 109 (E.D. Pa. 1986); Eastern Corporate Fed. Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1537 (D. Mass. 1986); Heritage Ins. Co. of America v. First National Bank of Cicero, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986); Airlines Reporting Corp. v. Barry, 666 F. Supp. 1311, 1314-1315 (D. Minn. 1987); Blue Cross Of Western Pennsylvania v. Nardone, 680 F. Supp. 195, 197 (W.D. Pa. 1988); Leonard v. Shearson Lehman/American Express, Inc., 687 F. Supp. 177, 181 (E.D. Pa. 1988); In Re Rexplore, Inc. Securities Litigation, 685 F. Supp. 1132, 1141 (N.D. Cal. 1988); P.M.F. Services, Inc. v. Grady, 681 F. Supp. 549, 555-556 (N.D. Ill. 1988); DeMuro v. E.F. Hutton, 662 F. Supp. 308 (S.D.N.Y. 1986); Econo-Car International, Inc. v. Agency Rent-A-Car, Inc., 589 F. Supp. 1368, 1372 (D. Mass. 1984).

Other district courts, however, hold that injury from the underlying racketeering acts is sufficient to give rise to a claim for relief under Section 1962(a).[8] These courts refuse to impose separate standing requirements for Sections 1962(a), (b), (c) and (d). Rightly, they recognize that to impose a "use or investment" limitation "would . . . revive the concept of a 'distinct racketeering injury' rejected by . . .

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[8] See, e.g., B.F. Hirsch, Inc. v. Enright Refining Co., 617 F. Supp. 49, 52 (D.N.J. 1985); Louisiana Power & Light v. United Gas Pipe Line, 642 F. Supp. 781 (E.D. La. 1986); Haroco, Inc. v. American National Bank & Trust Co., 647 F. Supp. 1026, 1033 (N.D. Ill. 1986); Roche v. E.F. Hutton & Co., Inc., 658 F. Supp. 315, 321 (M.D. Pa. 1986), aff'd, 862 F.2d 310 (3rd Cir. 1988); Snider v. Lone Star Art Trading Co., 659 F. Supp. 1249, 1256 (E.D. Mich. 1987); In Re Gas Reclamation, Inc. Securities Litigation, 663 F. Supp. 1123, 1125-1126 (S.D.N.Y. 1987); Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 828-829 (D. Kan. 1987).

[this Court] in Sedima." In Re National Mortg. Equity Corp. Mortg. Pool Certificates Securities Litigation, 682 F. Supp. 1073, 1081 (C.D. Cal. 1987).

The "use or investment" rule must also be placed in the context of the "person-enterprise" rule. Together, they threaten to insulate white-collar crime from legal accountability under RICO. Haroco, Inc. v. American National Bank and Trust Co. of Chicago, 647 F. Supp. 1026, 1033 (N.D. Ill. 1986) ("effectively shield deep corporate pockets"). A substantial majority of the circuits hold that Section 1962(c) of RICO requires separate entities to be the liable "person" and the designated "enterprise," whose affairs are conducted through a pattern of racketeering. Thus, it is not appropriate to sue a corporation for its violation of Section

1962(c). See generally, Equitable Relief at 585 n.237; Note, Innocence by Association, 63 Notre Dame L. Rev. 179, 203 n.173 (1988). In so holding, these circuits typically note that the "person" and the "enterprise" may be the same under Section 1962(a).[9] Section

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[9] See, e.g., Schreiber Distributing Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1398 (9th Cir. 1986) ("we hold that where a corporation is the direct or indirect beneficiary of the pattern of racketeering activity, it can be both the 'person' and the 'enterprise' "); Masi v. Ford City Bank and Trust, 779 F.2d 397, 401 (7th Cir. 1985) ("a corporation-enterprise may be held liable under subsection (a) when the corporation is also a perpetrator. x x x This result is in accord with the primary purpose of RICO, which, after all, is to reach those who ultimately profit from racketeering . . ."); (citing Haroco, Inc. v. American National Bank and Trust Co., 747 F.2d 384, 402, aff'd on other grounds, 473 U.S. 606 (1985)); Schofield v. First Commodity Corp., 793 F.2d 28, 31 (1st Cir. 1986) ("an interpretation that insulates the enterprise . . . under section 1962(c) is not . . . inconsistent with the remedial purposes of RICO. x x x [W]e agree with the (continued)

1962(a) is, therefore, the only section of the statute that a RICO plaintiff can, as a practical matter, use to sue a corporation under RICO, when it engages in a pattern of racketeering activity that injures the plaintiff. If the injury must come from the use or investment of racketeering income, however, an anomaly will result: The complaining witness in the RICO criminal prosecution -- the victim of the racketeering activity -- will be unable to sue in a RICO civil proceeding. It is nonsense to have a corporation as a "person," who can violate the statute -- note that

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analysis of . . . Haroco, which found that a culpable enterprise may be liable under . . . § 1962(a) . . . [which] prohibit[s] . . . [a] person from using ill-gotten gains in . . . the enterprise.") The adoption of the "investment or use" only rule would frustrate the approach to entity liability under RICO adopted by these circuits.

Section 1961(3) expressly includes "entities" within "person" -- without providing a concomitant remedy for its victims. See Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 829 (D. Kan. 1987) ("[I]f the plaintiff must be injured by the use of racketeering proceeds, rather than the underlying racketeering acts, only the competitors of the corporate defendant are likely to have standing. These competitors will, in most instances, be entirely unaware of the predicate acts.") RICO should be construed, therefore, so victims can sue perpetrators. In Re Rouss, 221 N.Y. 81, 91, 116 N.E. 782, 785 (1917) (Cardozo, J.) ("consequences cannot alter statutes, but may help to fix their meaning").

Finally, the Tenth Circuit's contrary holding ignores the statute's private attorney general design. Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 151 (1987) (" 'private attorneys general' [for] a serious national problem for which public prosecutorial resources are deemed inadequate"); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987) ("vigorous incentives for plaintiffs to pursue RICO claims"); Sedima, 473 U.S at 493 ("private attorney general provisions . . . designed to fill prosecutorial gaps"). It ought to be rejected by this Court before it does further harm to those victimized by conduct prohibited by RICO.

2. This Court Must Grant Certiorari to Reconcile Conflicting Lower Court Decisions on the Requirement for "Injury" Necessary to State a Claim for Relief Under 18 U.S.C. §§ 1962(d), 1964(c).

By requiring Grider to be able to allege an injury under Section 1962(a) as a prerequisite to alleging an injury under Section 1962(d), the Tenth Circuit has effectively read Section 1962(d) out of the statute. It is an interpretation that cannot be supported by the plain language of the statute, and it is at fundamental odds with established civil conspiracy law under other federal statutes and the common law.

The Tenth Circuit, without analysis, held:

> We likewise conclude that Grider has no standing to assert a claim for damages based on the alleged conspiracies to violate section 1962(a).

> Because he has not alleged injury from the substantive violations, he has failed to show how the alleged conspiracy to commit those violations caused him injury.

868 F.2d at 1151.

The Tenth Circuit's reading of Section 1962(d) cannot be squared with the text of the statute or its purpose, much less its liberal construction clause. 18 U.S.C. § 1964(c) says "injured . . . by reason of a violation of Section 1962." It does not say "by reason of a violation of Section 1962(a), (b) or (c), but not (d)." The Tenth Circuit's interpretation of Section 1962(d), therefore, largely drains its independent meaning. It also squarely conflicts with other well reasoned decisions. See, e.g., Rice v. Janovich, 109 Wash. 2d 48, 49-52, 58-62, 64-67, 742 P.2d 1230, 1232, 1236-38,

1239-40 (1987) (RICO conspiracy: injury by assault cognizable); Williams v. Hall, 683 F. Supp. 639, 642-644 (E.D. Ky. 1988) (RICO conspiracy: injury by firing cognizable). Aptly, the District Court in Williams observed:

> The common law of civil conspiracy looks to overt acts as the source of compensable injury. . . . The court believes that the Supreme Court, if called upon to address the issue, would follow the common law of civil conspiracy in determining standing under § 1962(d). x x x This court now holds that a plaintiff who has proven a § 1962(d) conspiracy to violate § 1962(a) or (c) has standing to recover under § 1964(c) if he can show injury from any overt acts done pursuant to the conspiracy. Id. at 642-643.

Under the common law, once a conspiracy is shown, any injury inflicted by an overt act in furtherance of the conspiracy is civilly cognizable. See Nalle v. Oyster, 230 U.S. 165, 182

(1913) ("[T]he well-settled rule is that no civil action lies for a conspiracy unless there be an overt act that results in damage to the plaintiff."); Hooks v. Hooks, 771 F.2d 935, 944 (6th Cir. 1985); Halberstam v. Welch, 705 F.2d 472, 487 (D.C. Cir. 1983). Conspiracy is not the basis of the claim for relief; it is the injury that flows from an overt act that forms the basis for compensable injury.[10]

To state a claim under section 1962(d), no plaintiff ought to have to show more than there was a plan, the

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[10] See, e.g., United States v. Excellair, Inc., 637 F. Supp. 1377, 1388 n.7 (D. Colo. 1986) (no standing under antitrust, but standing under civil conspiracy) ("civil conspiracy does not require that the requisite 'unlawful act' component of a civil conspiracy claim itself afford a plaintiff a remedy."); Weise v. Reisner, 318 F. Supp. 580, 583 (E.D. Wis. 1970).

alleged co-conspirators shared in the conspiratorial objective, and an overt act that caused injury was committed in furtherance of the conspiracy. See, e.g., Rice v. Janovich, 109 Wash. 2d at 48, 49-52, 58-62, 64-67, 742 P.2d at 1232, 1236-38, 1239-40; Halberstam v. Welch, 705 F.2d at 487. Conspiracy under RICO, in short, should be treated in the same manner as conspiracy under other federal statutes, including, for example, the civil rights statutes or the antitrust statutes.[11] By requiring

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[11] See Griffin v. Breckenridge, 403 U.S. 88, 103 (1971) (acts of detention, threats, and battery done in furtherance of conspiracy actionable under 42 U.S.C. § 1985(3); Lenard v. Argento, 699 F.2d 874, 883 (7th Cir.) (Even though there was insufficient evidence to prove a 42 U.S.C. § 1983 violation, "that does not mean that there was insufficient evidence of a 1985(3) conspiracy."), cert. denied, 464 U.S. 815 (1983); Lawrence v. Acree, 665 F.2d 1319, 1324 (D.C. Cir. 1981) ("We decline to deprive section (continued)

that Grider to be injured under Section 1962(a) to bring an action under Section 1962(d), the Tenth Circuit reads a limitation into RICO that cannot be supported by its text, the statute's liberal construction clause, its legislative history, or well-established civil conspiracy law. Indeed, Congress drafted RICO outside of the antitrust statutes so it would be broader. Sedima, 473 U.S. at 498-99. The Tenth Circuit has now made it narrower, "creat[ing] exactly the problems Congress sought to avoid." Id. It cannot be what Congress intended. It, too,

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1985 and other civil conspiracy statutes of significant meaning by requiring that each overt act in furtherance of the conspiracy be independently actionable."); Ostrofe v. H.S. Crocker Co., 740 F.2d 739, 744 (9th Cir. 1984), cert. dism'd, 469 U.S. 1200 (1985) (antitrust); Donahue v. Pendleton Woolen Mills, Inc., 633 F. Supp. 1433, 1437 (S.D.N.Y. 1986) (antitrust).

ought to be reversed before it does further harm to those victimized by conduct prohibited by RICO.

CONCLUSION

Congress expressly designed the Organized Crime Control Act of 1970 to "strengthen[. . .] the legal tools in the evidence-gathering process, . . . [to] establish[. . .] new penal prohibitions, and [to] provide[. . .] enhanced sanctions and new remedies . . ." 84 Stat. 923. Congress was concerned about "fraud." Id. at 922. It found that "the sanctions and remedies available" under the prior law were "unnecessarily limited in scope and impact." Id. at 923. It then provided treble damage relief for "person[s] injured" in their "business or property" by violations of RICO, Title IX of the statute. 18 U.S.C. § 1964(c). Congress, after full

debate, consciously did not limit the statute's application to organized crime. Sedima, 473 U.S. at 495 ("not just mobsters"). Its application depends on what you do, not who you are -- white collar, or blue collar, or no collar at all. Significantly, Congress directed that RICO be "liberally construed to effectuate its remedial purposes." 84 Stat. 947.

The promises of 1970 now ring hollow. Blue Chip Stamps v. Manor Drug Store, 421 U.S. 723, 748 (1975) ("[T]he Judiciary may not circumscribe a right which Congress has conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability").[12]

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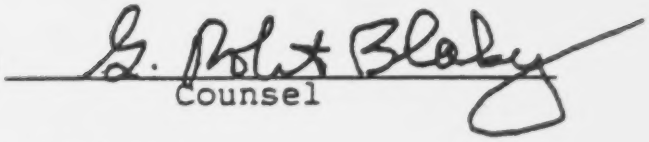
[12] "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for" the legislative (continued)

branch. United States v. Rodgers, 466 U.S. 475, 484 (1984). As such, it is unconstitutional under Articles I (legislative power) and III (judicial power) of the Constitution for courts to redraft legislation. Congress, too, is being pressed both to retain and to circumscribe Civil RICO. No indication exists that Congress is unable to fulfill its constitutional role. If the greed of the securities and commodities industries and the accounting profession had not led them to try to obtain their exclusion from RICO and to make the other reforms retroactive, including a reduction of the treble to actual damage, the "reform" legislation would have passed in the 100th Congress. 134 Cong. Rec. E. 3717-20 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers). It is likely that it will pass in the 101th Congress in any event. 135 Cong. Rec. 1652 (daily ed. Feb. 23, 1989) (statement by Sen. de Concini and Sen. Hatch). If RICO is, in short, to be rewritten, Congress must do it. Sedima, 473 U.S. at 499. However, although Congress is presently considering revisions of RICO, the problems created by the split in the authorities cited in this Petition are not being addressed by Congress.

Dated: June 8, 1989.

Respectfully submitted,

CORNWELL & BLAKEY

By: 
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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rules 19-3 and 28 of the Supreme Court Rules, and on this 14TH day of June, 1989, three true and accurate copies of the foregoing PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT have been mailed to the following counsel who constitute all parties that are required to be served: Robert D. Nelson, Esq., Babette Patton, Esq., Andrews, Davis, Legg, Bixler, Milsten & Murrah, 500 West Main, Oklahoma City, Oklahoma 73012; Robert D. Baron, Esq., Fellers, Snider, Blankenship, Bailey & Tippins, 2400 First National Center, Oklahoma City, Oklahoma 73102, Gregory A. McKenzie, McKenzie & Sykora, 210 Park Avenue, Suite 300, Oklahoma City, Oklahoma 73102; Wayne N. Campbell, Esq., Allen Campbell, Esq., 5716 South Western, Suite A, Oklahoma City, Oklahoma 73109.

G. Robert Blakey

Guy GRIDER, Plaintiff-Appellant,

v.

TEXAS OIL & GAS CORP., a Delaware corporation, TXO Production Corp., a Delaware corporation, Ratliff Exploration Company, an Oklahoma corporation, Ratliff Drilling Company, an Oklahoma corporation, Diversified Oil and Gas Exploration, Inc., an Oklahoma corporation, Diversified Well Servicing Corporation, Barton W. Ratliff, and Jim D. Brewer, Defendants-Appellees.

No. 87-1671.

United States Court of Appeals,
Tenth Circuit.

Jan. 4, 1989.

Rehearing and Rehearing En Banc
Denied March 21, 1989.

Before SEYMOUR, ANDERSON and BRORBY, Circuit Judges.

SEYMOUR, Circuit Judge.

Guy Grider brought this action for damages allegedly resulting from violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§

1961-1968 (1982) (RICO). The district court granted defendants' motion to dismiss for failure to state a claim, concluding that Grider had not alleged the requisite injury under the substantive RICO provisions and therefore had no standing to assert a civil damage claim. The court also held that the RICO conspiracy claims based on those substantive violations must be dismissed as well. Grider appeals and we affirm.[1]

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[1] In addition, Grider alleged federal antitrust violations and numerous pendent state law claims, which the district court also dismissed. Grider does not contend on appeal that the court erred in dismissing the antitrust claims, nor does he argue that the court abused its discretion in dismissing the pendent claims. The defendants named only in the antitrust and state claims assert that Grider has abandoned those claims. In response, Grider contends that, should we decide to reinstate the RICO claims, he has not waived his right to pursue the state claims against these defendants under principles of pendent party jurisdiction. In view of our (continued)

I.

[1] Upon review of the dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted, "this court must take the allegations of the complaint at face value and must construe them most favorably to the pleader." Huxall v. First State Bank, 842 F.2d 249, 250-51 (10th Cir. 1988). The grant of such a motion is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Id. (citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957)).

Viewed in this light, the complaint reveals that Grider, a working interest

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decision to affirm the district court, we need not address this issue.

holder in a group of oil and gas wells, asserts that defendants, the well operators, engaged in two interrelated schemes to defraud in connection with the operation of the wells. In particular, Grider alleges that in one scheme certain of defendants reduced his revenues by illegally venting natural gas, stole natural gas from the wells for drilling operations, sold gas without paying him the appropriate revenue, unlawfully fixed prices, double-billed him, and mishandled an escrow account to his detriment. Grider alleges that in the second scheme various defendants breached their fiduciary duty to him, conspired to fix prices, failed to pass on his share of rebates and discounts, mishandled an escrow account, double-billed him, billed him for non-existent goods and services, and withheld his

share of production revenues. Grider asserted that the acts in both schemes involved use of the mails in violation of the federal mail fraud statute. See 18 U.S.C. § 1341 (1982). Grider also alleges that defendants participating in each scheme conspired with each other, other defendants, and others unknown to carry out these activities.

Grider asserts two claims for relief under RICO section 1962(a) corresponding to the two fraudulent schemes described above, alleging in the language of the statute that named defendants

> "used and invested, directly or indirectly, part of the income or the proceeds of the income, in the acquisition of an interest in or the establishment or operation of the enterprise, which income had been derived, directly or indirectly, from a pattern of activity within the meaning of 18 U.S.C. §§ 1961(1)(B) and (5) and 1962(a), namely, multiple instances of

> mail fraud in violation of 18 U.S.C. § 1341."

Rec., vol. I, doc. 1, at 34, 35. In addition, Grider asserts two claims under section 1962(d), alleging conspiracies to commit the two substantive violations.

In granting their motion to dismiss, the district court agreed with defendants that Grider's complaint failed to satisfy section 1964(c), which provides a civil damage remedy to "[a]ny person injured in his business or property by reason of a violation of section 1962." The district court concluded that a violation of section 1962(a) occurs through the use or investment of racketeering income, and that Grider, although alleging injury from the racketeering acts themselves, had not alleged any facts showing injury from the use or

investment of the income derived from the racketeering acts. On appeal, Grider contends that a plaintiff asserting a civil claim for damages based on a section 1962(a) violation need not show injury from the use or investment of racketeering income if he can show injury from the racketeering activity itself.

II.

[2] In determining the scope of RICO, "we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' " Russello v. United States, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983) (quoting U.S. v. Turkette, 452 U.S. 576,

580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981)).

Section 1962(a) states in pertinent part:

> "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

18 U.S.C. § 1962(a) (emphasis added). Significantly, the statute does not state that it is unlawful to receive racketeering income; rather, as the italicized language underscores, the statute prohibits a person who has received such income from using or investing it in the proscribed manner. As previously noted, section 1964(c)

provides a civil damage remedy only to those persons injured "by reason of a violation of section 1962." It thus appears from the plain language of these two provisions that a plaintiff seeking civil damages for a violation of section 1962(a) must plead facts tending to show that he was injured by the use or investment of racketeering income. Injury from the racketeering acts themselves is not sufficient because section 1962(a) does not prohibit those acts.

[3-5] Although numerous district court decisions have addressed this issue, we have found no reported circuit court opinion on point. The majority of district courts considering standing to assert a section 1962(a) violation have agreed with this interpretation and have required a plaintiff to show injury from the use or investment of racketeering

income. See, e.g., Leonard v. Shearson Lehman/American Express, Inc., 687 F. Supp. 177, 181 (E.D. Pa. 1988); In re Explore, Inc. Sec. Litig., 685 F. Supp. 1132, 1141-42 (N.D. Cal. 1988); P.M.F. Services v. Grady, 681 F. Supp. 549, 555-56 (N.D. Ill. 1988); Omega Constr. Co. v. Altman, 667 F. Supp. 453, 465 (W.D. Mich. 1987); Airlines Reporting Corp. v. Barry, 666 F. Supp. 1311, 1314-15 (D. Minn. 1987); DeMuro v. E.F. Hutton, 662 F. Supp. 308 (S.D.N.Y. 1986); Cincinnati Gas & Elec. Co. v. General Elec. Co., 656 F. Supp. 49, 83-84 (S.D. Ohio 1986).

Some of the courts concluding that injury from racketeering activity alone is sufficient to support a section 1962(a) civil damage claim base their decisions primarily upon language in Sedima, S.P.R.L. v. Imrex Co., 473 U.S.

479, 495-97, 105 S.Ct. 3275, 3285-86, 87 L.Ed.2d 346 (1985). See, e.g., In re National Mort. Equity Corp. Mort. Pool Certif. Sec. Litig, 682 F. Supp. 1073, 1081-82 (C.D. Cal. 1987); Smith v. MCI Telecommunications Corp., 678 F. Supp. 823, 828-29 (D. Kan. 1987). The Sedima opinion does not justify the conclusion that injury from racketeering activity alone is enough to create standing under section 1962(a). The Court there was considering a claim based on section 1962(c), which differs significantly from section 1962(a) in that it specifically prohibits the conduct of an "enterprise's affairs through a pattern of racketeering activity," 18 U.S.C. § 1962(c), thus making unlawful the racketeering activity itself. Indeed, in holding that the plaintiff in Sedima had standing to assert a section 1962(c)

claim upon showing an injury from racketeering activity, the Court cautioned that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." 473 U.S. at 496, 105 S.Ct. at 3286; see also Cullom v. Hibernia Nat'l Bank, 859 F.2d 1211, 1214-15 (5th Cir. 1988) (discussing standing under section 1964(c) in light of Sedima).

Some courts, as a matter of policy, allow a plaintiff to recover under section 1962(a) upon a showing of injury from racketeering activity, emphasizing that RICO is to be broadly construed. See, e.g., Smith, 678 F. Supp. at 828. However, the general principle that RICO is to be accorded a liberal interpretation cannot justify expanding section

1962(a) beyond the limits of that subsection's own language. See Haroco v. American Nat'l Bank & Trust Co., 747 F.2d 384, 400 (7th Cir. 1984), aff'd, 473 U.S. 606, 105 S.Ct. 3291, 87 L.Ed.2d 437 (1985); Schofield v. First Commodity Corp., 793 F.2d 28, 30 (1st Cir. 1986); P.M.F. Services, 681 F. Supp. at 555.

Finally, courts have expressed concern that some corporate defendants will be beyond the reach of RICO unless a plaintiff may assert injury from racketeering activity under section 1962(a), because corporations generally cannot be both the person and the enterprise under section 1962(c).[2] See, e.g., Smith, 678

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[2] Section 1962(c) states:

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or
(continued)

F. Supp. at 829; Louisiana Power & Light v. United Gas Pipe Line, 642 F. Supp. 781, 806-07 (E.D. La. 1986). However, "using the proceeds of racketeering activities to infiltrate legitimate businesses can obviously cause damage to many persons, who would have a perfect right to sue." Gilbert v. Prudential-

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> foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern or racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(c). The courts generally agree that the language of this section does not permit the person who conducts the affairs of an enterprise through racketeering activity to be one and the same as that enterprise. See, e.g., Garbade v. Great Divide Mining & Milling Corp., 831 F.2d 212, 213 (10th Cir. 1987); Schreiber Distrib. v. Serv-Well Furniture Co., 806 F.2d 1383, 1396 (9th Cir. 1986); Morgan v. Bank of Waukegan, 804 F.2d 970, 977 (7th Cir. 1986). Under this construction, a corporation that conducts its own affairs through racketeering activity is not within the ambit of section 1962(c).

Bache Sec. Inc., 643 F. Supp. 107, 111 (E.D. Pa. 1986). Moreover, "if neither section 1962(a) nor section 1962(c) cover all methods of corporate wrongdoing, it is up to Congress, and not the courts, to expand the scope of the statute." Schofield, 793 F.2d at 31 n.2.

In sum, we find no justification for disregarding the clear language of either section 1962(a), which prohibits the use or investment of income from racketeering activity, or section 1964(c), which requires injury by reason of such a violation. Accordingly, we hold that, because Grider has failed to allege any facts showing injury from the use or investment of racketeering income, he has no standing to assert a claim for damages based on a violation of section 1962(a). We likewise con-

clude that Grider has no standing to assert a claim for damages based on the alleged conspiracies to violate section 1962(a). Because he has not alleged injury from the substantive violations, he has failed to show how the alleged conspiracy to commit those violations caused him injury. Cf. Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927 n.2 (10th Cir. 1987).

The judgment of the district court is affirmed.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GUY GRIDER,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 87-1671
	)	
TEXAS OIL & GAS CORP., a Delaware corporation, et al.	)	
	)	
	)	
Defendants-Appellees.	)	

ORDER ON REHEARING

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges

The court has reviewed plaintiff's petition for rehearing. The panel has voted to revise the slip opinion by deleting the full paragraph beginning on page 10 and ending on page 11. A new page 10 is attached.

The panel voted to deny the petition in all other respects.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the court

//s// Robert L. Hoecker
ROBERT L. HOECKER, Clerk

right to sue." Gilbert v. Prudential-Bache Sec. Inc., 643 F.Supp. 107, 111 (E.D. Pa. 1986). Moreover, "if neither section 1962(a) nor section 1962(c) cover all methods of corporate wrongdoing, it is up to Congress, and not the courts, to expand the scope of the statute." Schofield, 793 F.2d at 31 n.2.

In sum, we find no justification for disregarding the clear language of either section 1962(a), which prohibits the use or investment of income from racketeering activity, or section 1964(c), which requires injury by reason of such a violation. Accordingly, we hold that, because Grider has failed to allege any facts showing injury from the use or investment of racketeering income, he has no standing to assert a claim for damages based on a violation

of section 1962(a). We likewise conclude that Grider has no standing to assert a claim for damages based on the alleged conspiracies to violate section 1962(a). Because he has not alleged injury from the substantive violations, he has failed to show how the alleged conspiracy to commit those violations caused him injury. Cf. Torwest DBC, Inc. v. Dick, 810 F.2d 925, 927 n.2 (10th Cir. 1987).

The judgment of the district court is affirmed.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OKLAHOMA

GUY GRIDER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-86-2155-W
	)	
TEXAS OIL & GAS CORP., a Delaware corporation, TXO PRODUCTION CORP., a Delaware corporation, RATLIFF EXPLORATION COMPANY, an Oklahoma Corporation, RATLIFF DRILLING COMPANY, an Oklahoma corporation, DIVERSIFIED OIL AND GAS EXPLORATION, INC., an Oklahoma corporation, DIVERSIFIED WELL SERVICING CORP., an Oklahoma corporation, BARTON W. RATLIFF, and JIM D. BREWER,	)	
	)	
Defendants.	)	

ORDER

Defendants, Diversified Oil & Gas Exploration, Inc. (hereinafter "DOG"),

Diversified Well Servicing Corp. (hereinafter "DWS"), and Jim Brewer (hereinafter "Brewer"), move the Court to dismiss plaintiff's actions against them for failure to state claims upon which relief can be granted. Similarly, defendants Ratliff Exploration Company (hereinafter "REC"), Ratliff Drilling Company (hereinafter "RDC"), and Barton W. Ratliff (hereinafter "Ratliff"), move the Court to dismiss plaintiff's complaint pursuant to Rule 12(b), Fed. R. Civ. P. Finally, defendants Texas Oil & Gas Corporation, (hereinafter "TOG"), and TXO Production Corporation (hereinafter "TXO"), move to dismiss the complaint as to them, pursuant to Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

Pursuant to Rule 12(b)(6), Fed. R. Civ. P., the factual allegations of the complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the complaint. Mitchell v. King, 537 F.2d 385 (10th Cir. 1976). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). After careful consideration of the submissions of all the parties in the instant case, the Court finds that plaintiff's complaint fails to state a claim upon which relief can be granted as to plaintiff's claims under 18 U.S.C. §§ 1962(a) and (d) and 15 U.S.C. § 1. Accordingly, the Court finds it lacks jurisdiction of the re-

maining, pendent claims which plaintiff asserts against the various defendants.

INTRODUCTION

Plaintiff, Guy Grider (hereinafter "Grider"), filed an action against the above-named defendants set forth in a sixty-two page complaint (exclusive of exhibits). Grider alleges he suffered damages by reason of defendants' violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq.; price-fixing in violation of the Sherman Act, 15 U.S.C. § 1 ("Sherman Act"); Oklahoma antitrust law, 79 Okla. Stat. § 1; breaches of contracts and fiduciary duties; fraud; conversion; money had and received; other tortious acts; and certain other pendent claims. The complaint contains forty-one separate claims for relief against the various defendants.

Defendants have filed three separate motions to dismiss, each of which alleges Grider's RICO claims and Sherman Act claims fail to state a cause of action and should be dismissed. Dismissal of those claims necessarily deprives the Court of its jurisdiction and results in a dismissal of plaintiff's entire complaint. Defendants set forth several additional arguments in support of their motions to dismiss, such as certain state claims are barred by the applicable statute of limitations and plaintiff lacks standing to pursue his alleged Sherman Act claims. However, the Court declines to address these alternate theories raised by defendants for dismissal. It bases its ruling herein on the Rule 12(b)(6) arguments presented as to the RICO and Sherman Act claims, and finds plaintiff fails to

state a cause of action under both sets of claims.

FACTS

Grider is a small percentage working interest owner in a group of oil and gas wells in the Wheatland Prospect and the Airport Trust Lands, located in Oklahoma County, Oklahoma. Grider originally filed his action against these defendants in the District Court for Oklahoma County, but dismiss that action on the day he filed his complaint with this Court. REC and TXO operated, at one time or another, the wells involved in this lawsuit.

DISCUSSION

RICO CLAIMS

Plaintiff's first through fourth claims for relief are based on alleged violations of RICO. Those claims may be summarized as follows:

FIRST CLAIM: TOG and REC violated 18 U.S.C. § 1962(a).

Grider alleges in his first claim REC illegally vented gas from wells in which he had an interest (Complaint ¶¶ 42-49); stole gas from those wells (Complaint ¶¶ 50-60); failed to pay Grider for production from those wells (Complaint ¶¶ 61-68); unlawfully fixed prices through a contract with DOG or DWS (Complaint ¶¶ 69-77); double-billed Grider on joint interest billings (Complaint ¶¶ 78-81); and mishandled an escrow account on one of the wells (Complaint ¶¶ 82-89). Grider alleges defendants unlawfully used the mails to accomplish the various wrongs, in violation of 18 U.S.C. § 1341 (mail fraud) (Complaint ¶¶ 26, 94-95, 178), and further alleges he is entitled to recover treble damages therefor. Grider claims

TOG is liable for REC's alleged conduct as a successor in interest to REC, pursuant to contract dated November 15, 1984 (Complaint ¶¶ 3, 96-109). The Court need not discuss the successor liability issue, as its determination Grider failed to state a claim under RICO or § 1 of the Sherman Act claim against these defendants renders the successor liability issue moot.

SECOND CLAIM: TOG and REC violated 18 U.S.C. § 1962(d).

Grider alleges facts in his second claim, under 1962(d), identical to the facts he alleges in his first claim, under § 1962(a). (Complaint ¶¶ 1-95). The second claim for relief recites the following language:

> 184. Ratliff Exploration Company conspired with others, within the meaning of 18 U.S.C. § 1962(d), to use and invest, directly or indirectly, part of

> the income or the proceeds of the income, in the acquisition of an interest in, or the establishment or operation of the enterprise, which income had been derived, directly or indirectly, from a pattern of activity within the meaning of 18 U.S.C. §§ 1962(1)(B), and (5) and 1962(a), namely, multiple instances of mail fraud in violation of 18 U.S.C. § 1341.
>
> 185. By reason of the violation of 18 U.S.C. § 1962(d) committed by Ratliff Exploration Company, Plaintiff has been injured in an undetermined amount within the meaning of 18 U.S.C. § 1964(c)."

THIRD CLAIM: TOG and TXO violated 18 U.S.C. § 1962(a).

The third claim for relief alleges TOG or TXO entered into illegal price-fixing agreements with defendant RDC (Complaint ¶¶ 96-109) and defendant DWS (Complaint ¶¶ 110-120); failed to pass on to working interest owners discounts received from national suppliers (Complaint ¶¶ 121-129); mishandled an escrow

account on one well (Complaint ¶¶ 130-139); double-billed working interest owners for goods and services (Complaint ¶¶ 140-145); billed them for goods never purchased (Complaint ¶¶ 146-151); billed them for services never performed (Complaint ¶¶ 157-167); and failed to pay working interest owners including Grider the amounts due them from production (Complaint ¶¶ 152-156). Again, Grider alleges TXO engaged in mail fraud and that its illegal activity damaged him.

FOURTH CLAIM: TOG and TXO violated 18 U.S.C. § 1962(d).

Grider alleges facts in his fourth claim, under § 1962(d), identical to the facts he alleges in his third claim, under § 1962(a). (Complaint ¶¶ 1-38 and 96-173). Similarly, the above-quoted sections from his second claim for relief, ¶¶ 184 and 185, are identical to

¶¶ 196 and 197 of the fourth claim for relief, with TOG and TXO inserted to replace REC.

The Court notes defendants do not argue Grider fails to allege the requisite pattern of racketeering activity or the predicate acts required under RICO. Brief of TOG and TXO at P. 6 and at n. 2. REC adopts this same view in its brief, which incorporates the brief of TOG and TXO. Brief of REC at P. 2. Defendants argue plaintiff's RICO claims are defective due to Grider's failure to allege he was injured "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Defendants assert the complaint is "fatally defective" in that the causal relationship between their alleged violations of § 1962(a) and the alleged damage suffered by Grider as a result thereof is missing. Brief of TOG

and TXO at P. 6. Defendants argue a § 1962(a) violation does not occur when income is derived from racketeering activity, but occurs through the use or investment of unlawfully derived money in the establishment or operation of an enterprise. The plaintiff must be injured "by reason of" the use or investment of the racketeering income. Eastern Corporate Federal Credit Union v. Peat, Marwick, Mitchell & Co., 639 F. Supp. 1532, 1537 (D. Mass. 1986); Vereins-Und Westbank AG v. Carter, 639 F. Supp. 620, 624 (S.D.N.Y. 1986); Gilbert v. Prudential-Bache Securities, Inc., 643 F. Supp. 107, 109, 110-11 (E.D. Pa. 1986) rev'd on other grounds, 769 F.2d 940 (3rd Cir. 1985); Heritage Ins. Co. of America v. First Nat'l. Bank of Cicero, 629 F. Supp. 1412, 1417 (N.D. Ill. 1986); Savastano v. Thompson

Medical Co., 640 F. Supp. 1086 (S.D.N.Y. 1986).

Defendants argue Grider alleges injury which results directly from the predicate acts of alleged racketeering, but fails to allege any injury arising from the use or investment of racketeering income. Upon a careful examination of the complaint, the Court must agree. The paragraphs of the second and fourth claims, quoted herein, allege defendants "used and invested, directly or indirectly, part of the income or the proceeds of the income, in the acquisition of an interest in or the establishment or operation of the enterprise, which income had been derived, directly or indirectly, from a pattern of activity within the meaning of . . . § 1962(a) . . ." However, these paragraphs, taken with the other paragraphs

regarding alleged RICO violations of the complaint, collectively fail to allege any injury which resulted from the use or investment of income derived from the alleged racketeering acts. Grider alleges, in a conclusory sentence, "by reason of the violation of 18 U.S.C. § 1962(d) committed . . . plaintiff has been injured in an undetermined amount within the meaning of 18 U.S.C. 1964(c)."

Grider's only argument in opposition to defendants' proposition cognizable damages under § 1964(c) must flow from the investment or use of racketeering proceeds, rather than from racketeering acts themselves, is that the cases defendants cite are decided wrongly, in that those cases "read RICO in a very restrictive rather than an expansive manner." Plaintiff's brief at P. 10.

Grider asserts "corporations like those before us simply cannot be permitted to escape liability under RICO by making untraceable investments in themselves." Grider's brief at P. 11. However, this Court cannot permit allegations of racketeering acts, absent the slightest hint of injury resulting through the use or investment of money derived therefrom in the establishment or operation of an enterprise, to survive a 12(b)(6) motion. The Court is left with bald conclusory statements as to any injury flowing from the investment or use of any racketeering proceeds.

Conclusory allegations, contained also in the first and third claims for relief, cannot survive a motion to dismiss under Rule 12(b)(6). The Court, in its analysis, must admit all well-

pleaded facts in the complaint, as distinguished from conclusory allegations. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), cert. denied, 397 U.S. 991, 90 S.Ct. 1111, 25 L.Ed.2d 399 (1970).

The complaint adequately alleges double-billing, stealing of gas, unlawful price-fixing, and other tortious acts or breaches of contracts and fiduciary duties. However, it fails to allege the requisite injury "by reason of" a violation of § 1962(a). Accordingly, the first and third claims for relief are HEREBY DISMISSED.

Similarly, the second and fourth claims are defective. Grider argues the predicate acts alleged to violate § 1962(a), in his first and third claims, constitute violations of § 1962(d), in the second and fourth claims, respec-

tively. Under § 1962(d), it is "unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) [of § 1962]. Defendants argue a determination Grider fails to allege any injury under § 1962(a) automatically signals a failure to allege a claim under § 1962(d).

Grider argues he need not show a probability of success upon a substantial violation of RICO to entitle him to relief under § 1962(d). Grider's brief at p. 12. The Court agrees. However, he cannot rely solely on conclusory allegations to establish his claim. A conspiracy charge pursuant to § 1962(d) requires proof of an agreement to engage in conduct that would establish a substantive RICO charge. United States v. Callanan, No. 86-1140 (6th Cir.) Feb. 10, 1986 Civil RICO Report. In order to

allege properly that defendants conspired to violate § 1962(a), which is the essence of a § 1962(d) violation, Grider first must allege facts which tend to establish some evidence of a substantive violation, whether or not success upon the substantive violation appears likely. Grider fails in this regard. See Complaint ¶¶ 108, 116. "A blanket statement that . . . defendants have conspired to fix prices . . . does not provide adequate notice for responsive pleading." Mountain View Pharmacy v. Abbott Laboratories, 630 F.2d 1383 (10th Cir. 1980). Accordingly, the second and fourth claims for relief are HEREBY DISMISSED.

SHERMAN ACT CLAIMS

The only claims remaining which vest this Court with jurisdiction to hear Grider's action are the alleged viola-

tions of 15 U.S.C. § 1 (Sherman Act).

The liberal notice pleading requirements of Rule 8(A), Fed. R. Civ. P. require a higher standard of pleading for an alleged violation of the antitrust laws than for other claims. "A general allegation that defendant violated one of the antitrust laws and that plaintiff was injured thereby is not sufficient." 5 C. Wright and A. Miller, Federal Practice and Procedure: Civil, § 1228 at 170 (1982). In fact, "conclusory allegations that defendant violated the antitrust laws and plaintiff was injured thereby will not survive a Motion to Dismiss if not supported by facts constituting a legitimate claim for relief." Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Devel. Corp., 711 F.2d 989, 995 (11th Cir. 1983), citing City of Gainesville

v. Florida Power and Light Co., 488 F. Supp. 1258, 1263 (S.D. Fla. 1980).

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. "Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985), citing Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5 (1958) (citing Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1910)). Certain practices have been deemed per se unreasonable, as a result of their pernicious effect on competition and lack of any redeeming virtue. Among the practices conclusive-

ly presumed to unreasonably restrain competition is price fixing. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210 (1940). Where such practices are established by the evidence, they are considered per se violations of the Sherman Act "without elaborate inquiry as to the precise harm they have caused" to competition. Northern Pacific Railway, 356 U.S. at 5.

In the absence of per se violation of § 1 of the Sherman Act, the "practices involved" must constitute a "restraint of trade or commerce" in violation of § 1. "Restraint of trade" as used in § 1 means an unreasonable suppression or elimination of competition in the purchase or sale of goods and services which affects commerce between the states. Only unreasonable restraints are prohibited, which are

restraints or conduct which appear to be reasonably calculated to prejudice the public interest, or tend to prejudice the public interest, and the public interest is that competition be open and unrestrained. Gradsky v. Sperry Rand Corp., 489 F.2d 502 (6th Cir. 1973), (jury instruction given therein). Depending upon interpretation, every commercial contract could be said to restrain competition, but not every such contract constitutes an illegal restraint of trade under the antitrust laws. The test of illegality is whether a particular restraint is such as promotes competition, has no effect on competition, or whether it is such as suppresses or even destroys competition. This test has been described as a rule of reason test - a determination whether the particular restraint alleged

is reasonable or unreasonable. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978), (jury instruction given therein), cert. denied, 459 U.S. 943, 103 S.Ct. 257 (1982).

In order to constitute a violation of § 1, Grider must allege a combination or conspiracy among defendants to restrain trade unlawfully. It is well established that "solely unilateral conduct, regardless of its anti-competitive effects, is not prohibited by Section 1." Contractor Utility Sales v. Certainteed Products, 638 F.2d 1061, 1074 (7th Cir. 1981), cert. denied, 470 U.S. 1029, 105 S.Ct. 1397 (1985). A company's unilateral decision to change its distribution system is not, by itself, prohibited by the Sherman Act. Fuchs Sugars & Syrups, Inc. v. Amstar

Corp., 602 F.2d 1025, 1030 (2d Cir. 1979), cert. denied, 444 U.S. 917 (1979). Indeed, a company may contract with a new distributor and consequently terminate its relationship with a former distributor without running afoul of the Sherman Act, even if the new contract has the effect of seriously damaging the former distributor's business. Dart Industries, Inc. v. Plunkett Co. of Oklahoma, 704 F.2d 496 (10th Cir. 1983); Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245 (5th Cir. 1975); Craig v. Sun Oil Co. of Pennsylvania, 515 F.2d 221 (10th Cir. 1975); cert. denied, 429 U.S. 829 (1976) (conspiracy resulting merely in substitution of one distributor for another does not violate § 1, nor is an increase in the number of distributors actionable under that section.) The Court notes at the outset

that the majority of antitrust cases cited herein, and available for analysis, are factually distinguishable from the instant case. The Court believes this is true due, at least in part, to the fact that the instant case is not an antitrust case. Therefore, it is not factually similar to the antitrust cases which are established as authority in this Circuit and in other circuits.

One case cited by defendants TOG and TXO, Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 (7th Cir. 1983) appears to be somewhat factually similar. Brief of TOG and TXO at pp. 13-14. In that case, plaintiff alleged defendants engaged in a six-year scheme to defraud plaintiff by falsifying purchase orders, invoices, and delivery receipts for business forms, paid for by Bunker but never deli-

vered. This type of activity is similar to Grider's allegations of double-billing and failure to provide services and goods for which Grider paid. In the Seventh Circuit case, plaintiff alleged defendants combined and conspired "to engage in conduct having the effect of restraining interstate commerce" through fixing prices of forms sold to plaintiff at an "artificially high, non-competitive price." 713 F.2d 1272 at 1279. These allegations may be compared with Grider's allegations in ¶¶ 74, 102, 106, 116 of the complaint. The Seventh Circuit held that complaint failed to state an antitrust claim pursuant to § 1 of the Sherman Act, following a "rule of reason" analysis. Pursuant to the rule of reason analysis, "the factfinder weighs all the circumstances of a case to decide whether a restrictive practice

should be prohibited as imposing an 'unreasonable restraint on competition.' " Bunker Ramo Corp. v. United Business Forms, Inc., 713 F.2d 1272 at 1283, citing Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 at 49, 97 S.Ct. 2549 at 2557, 53 L.Ed.2d 568 (1977).

> "It is not necessary under the rule of reason to show anticompetitive effects, or actual harm to competition, to establish an antitrust violation and a cause of action [citations omitted]. It is not the unfair means the defendant employed that is to be the focus of the inquiry, but whether those means 'lessened competition.' " [citations omitted] 713 F.2d at 1283.

The Court notes that the plaintiff failed to allege any anticompetitive effect arising from defendants' conduct, and that no inference to that effect could be made. The Court continued:

> "The closest Bunker Ramo comes to implicating any effect on competition is a bare allegation that it was charged an 'artificially high, non-competitive price.' This Court is unwilling to construe pleadings so liberally as to imply an anticompetitive effect or harm to competition where there is not even a bare allegation of such an effect and the alleged facts do not support one." 713 F.2d 1272 at 1285.

Noting the similarity of the above-cited case to the case at bar, and adopting the analysis of the rule of reason, the Court examines Grider's alleged violations of § 1. Those violations are contained in the fifth, sixth and seventh claims for relief and may be summarized as follows:

FIFTH CLAIM: REC, TOG, DOG, DWS, Ratliff and Brewer violated 15 U.S.C. § 1 (restraint of trade).

Grider's fifth claim alleges REC and DOG entered into a contract, through Ratliff and Brewer, which provided REC would continue to operate wells in the Wheatland Prospect and Airport Trust Lands. In return, the contract guaranteed DOG contract work on the wells. Complaint ¶¶ 69-74. Grider asserts defendants contracted for well completion services but the amounts charged for such services by DOG were determined "without competitive bidding" from independent third parties. He further alleges the amounts constituted "inflated prices" and were "excessive" in the context of the depressed economy. Complaint ¶¶ 71-74. Grider argues the purpose of this contract was to achieve "an objective that would create an unreasonable restraint of interstate commerce" and that it "did in

fact have the effect or was intended to have the effect of interfering unreasonably in the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade or commerce." Complaint ¶¶ 200, 201. The complaint alleges this contract constituted an unreasonable restraint of trade. Complaint ¶¶ 199-201.

SIXTH CLAIM: TOG, RDC, and Ratliff violated 15 U.S.C. § 1 (restraint of trade).

The sixth claim involves a contract entered into in 1984, between TOG, RDC, and Ratliff, wherein TOG purchased assets of REC and then advanced Ratliff one million dollars for drilling costs. The complaint asserts this contract restrained trade and interfered unreasonably in the ordinary, usual and

freely competitive pricing or distribution system of the open market. Complaint ¶¶ 96-109, 204-207.

SEVENTH CLAIM: TOG, TXO, DWS, DOG, and Brewer violated 15 U.S.C. § 1 (restraint of trade).

The seventh claim involves a contract between DOG and DWS, through Brewer. DOG and DWS agreed to assign all of their interests in the Wheatland Prospect and the Airport Trust Lands to TXO. The complaint alleges as an incentive for the assignments, TXO illicitly and improperly contracted to guarantee DWS a well service and workover contract on wells operated by TXO. Complaint ¶¶ 110-113. Grider alleges this agreement was intended to "create an unreasonable restrain on interstate commerce" and that "it did, in fact, have the effect or was intended to have the

effect of interfering unreasonably in the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade or commerce," and constituted an unreasonable restraint of trade. Complaint ¶¶ 212-213.

Defendants argue Grider's claims fail as bald assertions and legal conclusions "unsupported by the necessary and essential factual allegations regarding the very elements which must be adequately alleged . . . to successfully assert claims for alleged violations of § 1 of the Sherman Act. Brief of DOG at P. 6; Brief of Ratliff at P. 4, incorporating brief of DOG.

Grider fails to allege the acts of defendants produced even a minimal anti-competitive effect. Although Grider alleges the various contracts were

intended to interfere in the ordinary, usual and freely competitive pricing or distribution system of the open market in interstate trade or commerce, he fails to allege the contracts were intended to or in fact did, restrain and restrict competition or were intended to or in fact did, affect any relevant market. He fails to allege facts which support his conclusory allegations that trade was restrained.

Invocation of antitrust terms of art does not confer immunity from a motion to dismiss; to the contrary, conclusory statements must be accompanied by supporting factual allegations. "The pleader may not evade these requirements [of the Sherman Act violation] by merely alleging a bare legal conclusion; if the facts 'do not at least outline or adumbrate' a violation of the Sherman Act,

the plaintiffs 'will get nowhere merely by dressing them up in the language of antitrust.' " Car Carries, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984), cert. denied, 470 U.S. 1054, 105 S.Ct. 1758 (1985), citing Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 654 (7th Cir. 1984). Grider's allegations defendants failed to receive bids prior to entering into the contracts at issue, and his allegations the prices contracted were excessive, do not rise to the level of Sherman Act violations under § 1.

TOG and TXO argue that Sherman Act claims are defective "because they define no relevant market and allege no facts--rather than general conclusions--showing how interstate trade could be restrained unreasonably within that relevant market." TOG's and TXO's brief

at PP. 11-12. The Court concurs and finds a complaint must define a market and refer to a market-wide anticompetitive effect, actual or probable, in order to state an antitrust claim. Sutliff, Inc. v. Donovan Companies, Inc., 727 F.2d 648, 655 (7th Cir. 1984); Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484, 488 (8th Cir. 1985). The "unreasonableness of a restraint upon the market cannot be determined unless the market has been reasonably defined. . . . A relevant market is determined by consideration of two elements: (1) a relevant geographic market; that is, the geographical territorial area involved; and (2) a relevant product market - the type or area of goods or services in which the product which is subject to the restraint effectively competes."

Teleco, Inc. v. Ford Industries, Inc., 587 P.2d 1360, 1364 (Okla. 1978). Oakridge Investments v. Southern Energy Homes, 719 P.2d 848, 851 (Okla. 1986). The Court observes Grider fails to allege facts as to any market affected by actions of defendants, other than a vague and conclusory statement which contains the phrase "open market." This does not reasonably define a market, from which the Court could determine whether an unreasonable restraint upon such market actually occurred.

Grider argues per se violation of § 1 occurred, and attempts to avoid the "relevant market" requirement, which becomes unnecessary once per se violation is alleged. Grider cites United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) for the proposition it is unnecessary when claiming illegal per

se price fixing to plead and prove a "relevant market" or market-wide anti-competitive effects. Grider's reliance upon Socony-Vacuum Oil Co. is misplaced. Per se price fixing allegations are not present in his complaint. "Price fixing" is an agreement or arrangement, or understanding between two or more competitors to sell at a uniform price, or to raise or to stabilize prices. Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 585 F.2d 821 (7th Cir. 1978). To allege a per se price fixing scheme, the price fixing must occur as the result of competitor agreements which tamper with price structures or interfere with the setting of price by free market forces. Semke v. Enid Automobile Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (jury instruction given therein). Grider's allegations defen-

dants entered into bilateral contracts for well servicing and for other services to be performed cannot constitute a price fixing scheme, and therefore do not constitute illegal per se price fixing. Therefore, per se violation is not an issue herein, and Grider must allege a "relevant market" or market-wide anticompetitive effects in order to state a claim under § 1 of the Sherman Act. In the instant case, when analyzing the cumulative factual allegations, as distinguished from the conclusory statements, the Court cannot conclude the facts allege the contracts in question restrained trade, illegally fixed prices, or destroyed competition in some "open market." Nor can the Court conclude the facts allege such contracts produced even a minimal anticompetitive effect. As stated previously, depending

upon interpretation, every commercial contract could be said to restrain competition, but not every such contract constitutes an illegal restraint of trade under the antitrust laws. The Court does not reach the merits of an antitrust claim on a motion to dismiss. The Court must determine whether, taking all of Grider's factual, as distinguished from conclusory, allegations as true, he could prove no set of facts which would entitle him to relief under § 1 of the Sherman Act. Under the factual allegations of the complaint, the Court believes he fails to state a claim under § 1.

Grider alleges facts which could establish an obvious preference for one corporate entity over another, poor use of discretionary business judgment, breaches of contracts, breaches of fidu-

ciary duties, and other tortious acts. However, these allegations do not rise to the level of an "unreasonable" restraint of trade. Plaintiff cannot, by charging conspiracy between defendants and breaches of contracts and of fiduciary duties, and by adding antitrust "buzz words" to the complaint, turn what is basically a claim of violation of state law into a federal antitrust case.

Accordingly, plaintiff's fifth, sixth and seventh claims for relief are HEREBY DISMISSED. The Court observes the remainder of plaintiff's claims constitute pendent state claims. Those pendent state claims, eight through forty-one, are HEREBY DISMISSED.

ENTERED this 2nd day of April, 1987.

//s// Lee R. West
LEE R. WEST
UNITED STATES DISTRICT JUDGE

Entered in Judgment Docket
on 4/2/87. (handwritten)

No. 88-2045

Supreme Court, U.S.
FILED
AUG 8 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GUY GRIDER,

Petitioner,

VS.

TEXAS OIL & GAS CORP., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENTS, RATLIFF EXPLORATION COMPANY, RATLIFF DRILLING COMPANY AND BARTON W. RATLIFF, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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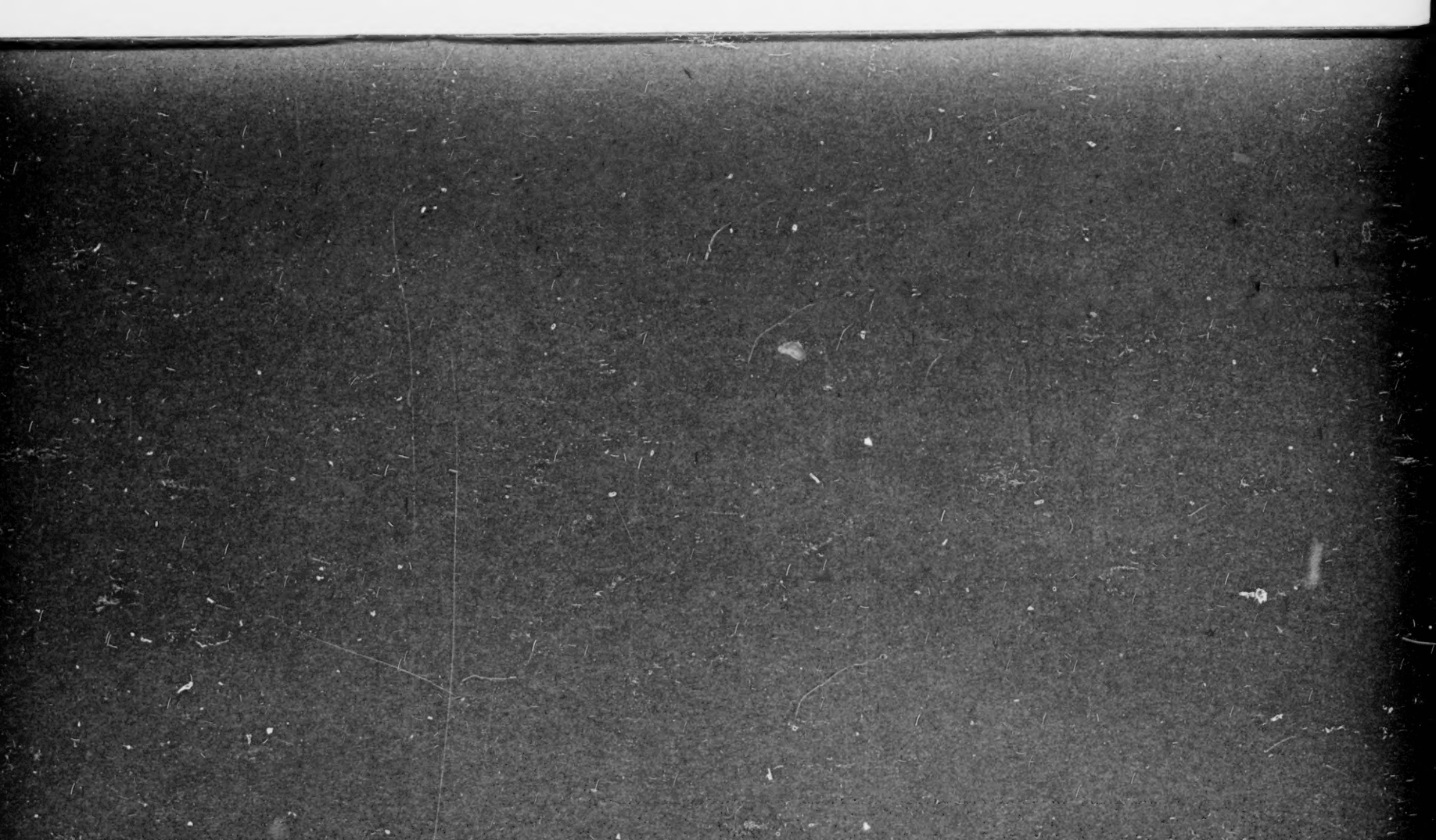

QUESTIONS PRESENTED

1. Did Petitioner fail to state a claim upon which relief can be granted under 18 U.S.C. §1964(c) for an alleged violation of 18 U.S.C. §1962(a) where he failed to allege facts showing injury from the use or investment of racketeering income?

2. Did Petitioner state a claim upon which relief can be granted under 18 U.S.C. §1962(d) for alleged conspiracy to commit violations of 18 U.S.C. §1962(a)?

3. Can a complaint which fails to state a claim for the substantive violation of 18 U.S.C. §1962(a) nevertheless state a claim for relief under 18 U.S.C. §§1962(d) and 1964(c) for alleged conspiracy to commit such a violation?

LIST OF PARTIES AND CORPORATIONS

The following is a list of Respondents' parent corporation and affiliated corporations:

Ratliff Drilling & Exploration Company

Ratliff Drilling Company

Ratliff Drilling, Inc.

Ratliff Exploration Company

General Oil Tool, an Oklahoma corporation

Radial Frac Services, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-2045

GUY GRIDER,

Petitioner,

vs.

TEXAS OIL & GAS CORP, et al.,

Respondents.

BRIEF OF RESPONDENTS, RATLIFF EXPLORATION COMPANY, RATLIFF DRILLING COMPANY AND BARTON W. RATLIFF

The Respondents, Ratliff Exploration Company, Ratliff Drilling Company and Barton W. Ratliff, respectfully submit that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. §§1962(a), 1962(d) and 1964(c), are set out in the Appendix attached hereto.

STATEMENT OF THE CASE

Respondents incorporate by reference and adopt as their Statement of the Case the Introduction and Part I of the Opinion of the Court of Appeals for the Tenth Circuit entered below and reported at 868 F.2d 1147, 1148-49.

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict, direct or indirect, among the Courts of Appeals on the questions presented, much less an intolerable or irreconcilable conflict. The Tenth Circuit correctly interpreted the pertinent statutes in a manner consistent with the common sense, everyday understanding of the language of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961, et seq., and Congress' gloss on it. Indeed, the only other federal court of appeals which has addressed the questions presented interpreted the pertinent statutes in the same manner as the Tenth Circuit. If the Tenth Circuit's correct interpretation of RICO results in neither §1962(a) nor §1964(c) covering all methods of corporate wrongdoing, that result is one inherent in the language of the statute and does not justify expanding §1962(a) beyond the limits of that subsection's own language. It is up to Congress and not the courts to expand the scope of the statute. Because the Tenth Circuit's correct interpretation of the pertinent statutes is not in conflict with decisions of other circuits, there is no reason to grant the writ.

REASONS FOR DENYING THE WRIT

1. No Conflict is Presented Among the Circuits by the Tenth Circuit's Correct Interpretation of RICO §§1962(a) and 1964(c).

Petitioner contends that the Tenth Circuit's application of RICO §1962(a), which prohibits a person who has received income derived from a pattern of racketeering from using or investing that income in an enterprise, and §1964(c) which

provides a treble damage remedy to those persons injured "by reason of a violation of Section 1962" is irreconcilably in conflict with decisions from the Second and Fifth Circuits. No such conflict between circuit decisions exists. Moreover, Petitioner's perceived conflict affords no ground to grant the writ requested by Petitioner.

A review on writ of certiorari will be granted only for special and important reasons. Supreme Court Rule 17.1. A conflicting decision by one federal court of appeals with another federal court of appeals on the same matter may, in an appropriate case, be a reason to grant a writ of certiorari. Supreme Court Rule 17.1(a). This case does not present a conflict, much less an "intolerable" or a "real and embarrassing" conflict of opinion between the courts of appeals. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951); *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J.) (certiorari denied where issue requires further study in lower courts before it is addressed by this Court). When this Court has granted a writ on the grounds of a conflict, it has generally been in the face of a well-developed, irreconcilable conflict where numerous circuits sharply disagree on an important issue. *See, e.g., H. J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 57 U.S.L.W. 4951, 4956 (U.S. June 27, 1989) ("widest and most persistent circuit split on an issue of federal law in recent memory") (Scalia, J., concurring); *Sedima, S. P. R. L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 n. 5-6 (1985) (variety of approaches taken by the lower courts).

Typically, the existence of the conflict has also usually been recognized not only by this Court, but by the circuits as well. *See, e.g., United*

States v. McElroy, 644 F.2d 274, 282 (3 Cir.), *cert. granted,* 454 U.S. 815 (1981), *aff'd,* 455 U.S. 642 (1982) ("[t]he majority of this court disagrees with the recent Tenth Circuit *en banc* decision . . . ."); *O'Malley v. United States,* 340 F.2d 930, 932 (7 Cir. 1964), *cert. granted,* 382 U.S. 810 (1965), *rev'd,* 383 U.S. 627 (1966) (". . . an opinion in which the [First Circuit] admitted, . . . that it was unable to agree with the Seventh Circuit.").

In the case *sub judice* no conflict exists, much less a sharp, well-developed conflict among the circuits. The Tenth Circuit considered the questions presented in this case in depth in arriving at the correct conclusion that the Plaintiff failed to state a claim upon which relief can be granted under the pertinent statutes. The Third Circuit (the only other circuit court of appeals which has addressed the precise issue addressed by the Tenth Circuit) in *Rose v. Bartle,* 871 F.2d 331 (3 Cir. 1989), interpreted the relationship between the substantive violation defined in §1962(a) and the requirements mandated in §1964(c) in the same way as the Tenth Circuit. *Id.* at 356-58.

The Petitioner argues that the Second Circuit decision in *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096 (2 Cir. 1988), *cert. denied,* ___ U.S. ___, 109 S.Ct. 1642 and 1643, 104 L.Ed.2d 158 (1989), and the Fifth Circuit decision in *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.,* 868 F.2d 740 (5 Cir. 1989), are in conflict with the Tenth Circuit's decision in the instant case and the Third Circuit's decision in *Rose v. Bartle,* 871 F.2d 331. They are not. Neither case specifically discusses §1962(a) or the necessary allegations under §1964(c) to state a claim upon which relief can be granted for alleged violation of §1962(a). Indeed,

both the general discussion of RICO in those cases and the specific discussion of §§1962(b) and (c) in *Ocean Energy II,* 868 F.2d 749, strongly suggest that the issue expressly decided by the Tenth Circuit and presented as the first question in this case was neither considered nor decided by the Second or Fifth Circuits.

The Tenth Circuit certainly perceived no conflict, concluding in its opinion below that "[a]lthough numerous district court decisions have addressed this issue, we have found no reported circuit court opinion on point" 868 F.2d at 1149, even though *Bankers Trust,* 859 F.2d 1096, had already been decided and was argued by Petitioner to be persuasive, contrary authority which justified rehearing the Tenth Circuit's initial decision. Even if there is some minor degree of conflict between the express holding of the Tenth Circuit and the broad range dictum of *Bankers Trust* and *Ocean Energy II,* Petitioner offers no cogent reason why such minor conflict can be resolved only by prompt action by this Court. The circuits should be allowed to consider the questions presented in this case by specific and concrete facts to see if any such conflict indeed exists and can be resolved. As this Court observed in *Maryland v. Baltimore Radio Show, Inc.,* 338 U.S. 912 (1950):

> "It may be desirable to have different aspects of an issue further illumined by the lower courts. Wise adjudication has its own time for ripening." 338 U.S. 912, 918.

Furthermore, the Petition should be denied because the Tenth Circuit has correctly interpreted §§1962(a) and 1964(c) in "a common-sense,

everyday understanding of RICO's language and Congress' gloss on it." *H.J. Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, 57 U.S.L.W. 4951, 4954 (U.S. June 27, 1989). The Petitioner's suggestion that any person who is injured by acts of racketeering can state a claim upon which relief can be granted pursuant to §1964(c) for violations of §§1962(a) or (b) ignores the plain language of the statute. Section 1962(a) does not make it unlawful to simply engage in racketeering acts or to receive racketeering income; rather, the statute prohibits a person who has received racketeering income from using or investing it in the proscribed manner. Section 1964(c) gives standing to assert a civil claim only to those who are injured by reason of a violation of §1962(a). The plain language of §§1962(a) and 1964(c) requires that a plaintiff seeking civil damages for a violation of §1962(a) plead facts tending to show he was injured by the use or investment of racketeering income. It is the use or investment of racketeering derived income which is prohibited by §1962(a), not the commission of the racketeering acts themselves.

Both the district court and the Tenth Circuit correctly found that Petitioner's Complaint failed to allege that he was injured by the use or investment of the racketeering income. The Tenth Circuit's interpretation of §§1962(a) and 1964(c) was correct. Petitioner's Complaint was properly dismissed and there is no reason to grant the requested writ.

This result is unaltered by Petitioner's plea that RICO be liberally construed or that corporate crime is on the rise. Petitioner ignores that in determining the scope of RICO,

> "... we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' "

Russello v. United States, 464 U.S. 16, 20 (1983) [quoting *United States v. Turkette,* 452 U.S. 576, 580 (1981)]. The Tenth Circuit's application of the plain language of §§1962(a) and 1964(c) is not contrary to clearly expressed legislative intent; indeed, it is reflective of "the legislative purpose ... expressed by the ordinary meaning of the words used." *H.J. Inc. v. Northwestern Bell Telephone Co.,* ___ U.S. ___, 57 U.S.L.W. 4951, 4953 (U.S. June 27, 1989) [quoting *Richards v. United States,* 369 U.S. 1, 9 (1962)]. If the interpretation and application of §§1962(a) and 1964(c) fail to weave all alleged corporate wrongdoers into their dragnet, then it is up to Congress and not the courts to expand the scope of the statute. As this Court most recently said, "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." Id. at 4956.

2. Petitioner's Failure to State a Claim Upon Which Relief Can be Granted Under 18 U.S.C. §1962(d) for Alleged Conspiracy to Commit Violations of §1962(a) Does Not Present Special and Important Reasons to Grant the Writ Requested

Petitioner frames his second reason for granting the writ as:

> "This Court must grant certiorari to reconcile conflicting lower court decisions on the requirement for 'injury' necessary

to state a claim for relief under 18 U.S.C. §§1962(d), 1964(c)." Petitioner's Brief at p. 29.

However, before the issue of injury becomes relevant under 18 U.S.C. §1962(d), Petitioner must first properly allege a substantive violation of that section. Petitioner did not. The issue of whether Petitioner's conclusional allegations of conspiracy were sufficient to state a claim does not present special or important reasons to grant the writ requested. Supreme Court Rule 17.1.

Petitioner's claim of conflict is thus unavailing. First, there is no conflict. Second, this Court is able to decide the case on another ground and thus not reach the point upon which Petitioner claims there is a conflict. Because it is not necessary to reach the conflict claimed to exist by Petitioner in order to decide the case, the writ should be denied. *Sanson Hosiery Mills v. NLRB,* 344 U.S. 863 (1952); *Arlington, Inc. v. Mayer,* 339 U.S. 965 (1950); *Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180 (1959).

Under §1962(d), it is "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) [of §1962(d)]." In order to allege a RICO conspiracy, Petitioner was required to allege facts to show proof of an agreement to engage in conduct that would violate a substantive RICO charge. Thus, in order to properly allege that Defendants conspired to violate §1962(a), which is the essence of Petitioner's §1962(d) claim, Petitioner was required to allege facts to show an agreement to use or invest proceeds received from racketeering in an enterprise.

In his Second and Fourth Claims for Relief, Petitioner alleged facts identical to those which he claimed stated a claim upon which relief could be granted for §1962(a). Petitioner then recited the language of 18 U.S.C. §1962(d) and concluded that Defendants violated it. Bald conclusional statements of a conspiracy without more are insufficient. The district court correctly found that Petitioner's conspiracy claims were premised on blanket statements and bald allegations without pleading any factual basis to support those claims. As such, the conspiracy claims were properly dismissed.

This Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. The function of the Supreme Court is to resolve conflicts of opinion on important federal questions that have arisen among lower courts, to pass upon questions of importance under the constitution, laws and treaties of the United States, and to exercise supervisory power over lower federal courts. *See, e.g., Address of Chief Justice Vinson Before the American Bar Association* (Sept. 7, 1949), 69 S.Ct. V, VI; *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 452-54 (1959) (Frankfurter, J., dissenting).

Petitioner seeks to have this Court correct a perceived error in the lower court decisions. The district court and Tenth Circuit properly dismissed Petitioner's conspiracy claims for failure to state a claim upon which relief can be granted. The writ should be denied.

3. No Conflict is Presented Among the Lower Courts by the Tenth Circuit's Correct Interpretation of RICO §§1962(d) and 1964(c)

As noted, Petitioner suggests that there is a conflict among the lower courts' decisions regarding his claim under §1962(d). There is no conflict. The cases cited by Petitioner merely reach different decisions based on different factual circumstances. The Tenth Circuit correctly concluded that because Grider failed to allege injury from the substantive violation, he likewise failed to show how the alleged conspiracy to commit those violations caused him injury.

Petitioner's suggestion that one only needs to allege injury from the predicate (overt) acts to state a claim for a RICO conspiracy would emasculate the distinctions between sections (a), (b), (c) and (d). In order to have standing for a claim under 18 U.S.C. §1962(d) for alleged conspiracy to violate 18 U.S.C. §1962(a), Petitioner must show that he was injured by reason of a conspiracy to violate §1962(a). He failed to allege that he was injured either by reason of the substantive violation or by reason of the conspiracy to commit the substantive violation.

Thus, the Tenth Circuit has not made RICO "narrower", as Petitioner contends, or "broader", but rather applied the plain language of the statute. Simply because Petitioner's garden-variety tort claims did not fit within the mold of the RICO language does not permit the Court to expand the language to satisfy Petitioner's quest for treble damages.

Petitioner failed to state a claim upon which relief can be granted under §1962(d). He further

failed to show how he was injured under that section. There is no conflict, and any perceived conflict is minor and should await further illumination by the lower courts. As such, the writ requested by Petitioner should be denied.

CONCLUSION

For the reasons stated above, the Writ of Certiorari should be denied.

/s/ ROBERT D. BARON

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**Counsel of Record*

Dated: August 8, 1989

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 7th day of August, 1989, pursuant to Rules 22.1 and 28.5, Revised Rules of the Supreme Court of the United States, three true and correct copies of the foregoing Brief of Respondents, Ratliff Exploration Company, Ratliff Drilling Company and Barton W. Ratliff, in Opposition to the Petition for Writ of Certiorari were mailed, postage prepaid, to the following parties required to be served:

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Robert D. Baron

APPENDIX

18 USC § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

***

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 USC § 1964. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Supreme Court, U.S.
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AUG 9 1989
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No. 88-2045

In The

Supreme Court of the United States

October Term, 1988

GUY GRIDER,

Petitioner,

vs.

TEXAS OIL & GAS CORP., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS TEXAS OIL & GAS CORP. AND TXO PRODUCTION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a complaint which fails to allege any facts showing injury from the use or investment of racketeering income state a claim for relief under 18 U.S.C. §1964(c) for an alleged violation of 18 U.S.C. §1962(a)?

2. Can a complaint which fails to state a claim for the substantive violation of 18 U.S.C. §1962(a) nevertheless state a claim for relief under 18 U.S.C. §§ 1962(d) and 1964(c) for an alleged conspiracy to commit such a violation?

PARTIES

These respondents' parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates are as follows:

TXO Production Corp. is a wholly-owned subsidiary of Texas Oil & Gas Corp., which is a wholly-owned subsidiary of USX Corporation. The subsidiaries of USX Corporation which are not wholly owned are the following:

Athlone Prospecting & Development Corporation, Ltd.
Companhia Siderurgica Paulista "Cosipa"
Merinda Mineracao (Partnership)
Mineracao Buritirama Ltda.
Mineracao Carajas, Ltda. (Partnership)
Mineracao Maraba, Ltda. (Partnership)
Mineracao Xingu, Ltda. (Partnership)
Termerid Mineracao, SA
Torremco Soc. Min. & Com. Ltda. (Partner)
Deepsea Ventures, Inc.
Ocean Mining Associates – Joint Venture
USS-POSCO Industries – Partnership
U. S. Steel France
Compagnie Miniere de l'Ogooue (Comilog)
USS Technology (Japan) Ltd.
ACE Holdings, Ltd.
Coda Holding, Ltd. (CODA-H)
Corporate Officers & Directors Assurance, Ltd. (CODA)
Adela Investment Company, S.A.
Avsteel SWA, Ltd.
Chrome Deposit Corp. (Court Holdings J.V.)
Kappa Mining & Prospecting Co., Ltd.

PARTIES – continued

La Pointe Iron Company
Prieska Copper Mines (Pty.) Ltd.
Societe Des Mines De Fer De Guinee Pour
L'Exploitation Des Monte Nimba (Mifergui Nimba)
Tilden Iron Mining Company
West Union Canal Company, The
Zuari Agro Chemicals Ltd.
Double Eagle Steel Coating Co. – Joint Venture
Live Oak Uranium Operations
National Oilwell – Partnership
Rockland Joint Venture (Cost-Sharing)
BMI Company – Joint Venture
Worthington Specialty Processing – Joint Venture
Arctic LNG Transportation Company
Badger Pipe Line Company
CLAM Petroleum Company
Cook Inlet Pipe Line Company
Explorer Pipeline Company
Gravcap, Inc.
Green Bay Terminal Corporation
Kenai LNG Corporation
LOCAP, Inc.
LOOP Inc.
Oasis Oil Company of Libya, Inc.
Oil Insurance Limited
Petroleum Terminals, Inc.
Platte Pipe Line Company
Polar LNG Shipping Corporation
Russell Stewart Oil Co.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Acadian Gas Pipeline System
Bayou Interstate Pipeline System
Calcesieu Gas Gathering System
Laredo Nueces Pipeline Company
Louisiana Industrial Gas Supply System
Neches Pipeline System

PARTIES – continued

Pelican Interstate Gas System
Pelican Transmission System
Ponchartrain Natural Gas System
Spindletop Gas Distribution System
Alabama Intrastate Supply
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No. 88-2045

In The

Supreme Court of the United States

October Term, 1988

GUY GRIDER,

Petitioner,

vs.

TEXAS OIL & GAS CORP., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF RESPONDENTS TEXAS OIL & GAS CORP. AND TXO PRODUCTION CORP. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Respondents Texas Oil & Gas Corp. and TXO Production Corp. respectfully submit that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. §§1962(a), 1962(d), and 1964(c), are set out in the Appendix attached hereto.

STATEMENT OF THE CASE

Respondents incorporate by reference and adopt as their Statement of the Case the introduction and part I of the opinion of the Court of Appeals for the Tenth Circuit entered below and reported at 868 F.2d 1147, 1148-49.

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict among the Circuits on the Questions Presented. The Tenth Circuit correctly interpreted the pertinent statutes in a manner consistent with the common-sense, everyday understanding of the language of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1961 *et seq.*, and Congress' gloss on it. If, in fact, the Tenth Circuit's correct interpretation of RICO permits some alleged corporate perpetrators of racketeering acts to escape its reach, then that "defect" is one inherent in the statute as written and beyond the power of the Court to correct. Because the Tenth Circuit's correct interpretation of the pertinent statutes is not in conflict with decisions of other Circuits, there is no reason to grant the writ.

REASONS FOR DENYING THE WRIT

1. No Conflict is Presented Among the Circuits by the Tenth Circuit's Correct Interpretation of RICO Sections 1962(a) and 1964(c).

Petitioner argues that the Tenth Circuit's reading of RICO sections 1962(a), which makes unlawful the use or investment in an enterprise of income derived from a pattern of racketeering, and 1964(c), which confers standing to bring a civil action upon those persons injured by reason of the violation of section 1962(a), is squarely in conflict with decisions from the Second and Fifth Circuits. No such conflict between Circuit decisions exists, and the purported conflict affords no ground to grant the writ requested by Petitioner.

Conflict among the decisions of the Circuits on the same matter may in an appropriate case be a reason to grant a writ of certiorari. Supreme Court Rule 17.1(a). When this Court has granted a writ on that ground, however, it has generally been in the face of a well-developed conflict where numerous Circuits sharply disagree on an important question. *See, e.g., H. J., Inc. v. Northwestern Bell Telephone Co.*, ___ U.S. ___, ___, 57 U.S.L.W. 4951, 4956 (1989) ("widest and most persistent circuit split on an issue of federal law in recent memory") (Scalia, J., concurring); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 486 and nn. 5-6 (1985) ("variety of approaches taken by the lower courts"); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 and n. 10 (1981) (circuits split 6-5); *Marks v. United States*, 430 U.S. 188, 189 and n. 1 (1977) (circuits split 2-3, with other circuits taking intermediate position). And the existence of the

conflict has usually been recognized not only by this Court but by the Circuits as well. *See, e.g., United States v. McElroy*, 644 F.2d 274, 282 (3rd Cir.), *cert. granted*, 454 U.S. 815 (1981), *aff'd*, 455 U.S. 642 (1982) ("The majority of this court disagrees with the recent Tenth Circuit *en banc* decision. . . ."); *O'Malley v. United States*, 340 F.2d 930, 932 (7th Cir. 1964), *cert. granted*, 382 U.S. 810 (1965), *rev'd*, 383 U.S. 627 (1966) (" . . . an opinion in which the [First Circuit] admitted . . . that it was unable to agree with the Seventh Circuit.").

In the present case, no such sharp, well-developed conflict among the Circuits exists, if indeed there is any conflict at all. The Tenth Circuit considered the Questions Presented in this case in depth, arriving at the correct conclusion that Petitioner had failed to state a claim under RICO sections 1962(a), 1962(d), and 1964(c). The Third Circuit, in *Rose v. Bartle*, 871 F.2d 331 (3rd Cir. 1989), interpreted the relationship between the substantive violation defined in section 1962(a) and the requirements for standing stated in section 1964(c) in the same way as the Tenth Circuit. *Id.* at 356-58.

Petitioner contends that the Second Circuit in *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096 (2nd Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1643 (1989), and the Fifth Circuit in *Ocean Energy II, Inc. v. Alexander & Alexander, Inc.*, 868 F.2d 740 (5th Cir. 1989), "have taken a contrary position." Petition for Writ of Certiorari p. 9. They have not. Other than noting in passing that the plaintiffs in those cases claimed that the defendants violated "18 U.S.C. §§1962(a)-(d)," *Bankers Trust*, 859 F.2d at 1099, *Ocean Energy*, 868 F.2d at 742, neither case specifically discusses section 1962(a) or the necessary allegations

under section 1964(c) to confer standing on a plaintiff to recover for a violation of section 1962(a). Indeed, both the general discussion of RICO in those cases and the specific discussion of sections 1962(b) and (c) in *Ocean Energy*, 868 F.2d at 749, suggest strongly that the standing issue expressly decided by the Tenth Circuit and presented as the first question in this case was neither considered nor decided by the Second or Fifth Circuits.

The Tenth Circuit itself certainly perceived no conflict, concluding in its opinion below that "[a]lthough numerous district court decisions have addressed this issue, we have found no reported circuit court opinion on point," 868 F.2d at 1149, even though *Bankers Trust* had already been decided and was argued by Petitioner to be persuasive contrary authority which justified rehearing the Tenth Circuit's initial decision.

Even if one were to sense some degree of conflict between the express holding of the Tenth Circuit and the dictum of the *Bankers Trust* and *Ocean Energy* cases, Petitioner offers no cogent reason why such minimal conflict can be resolved only by prompt action by this Court. To the contrary, the Circuits should be allowed to consider in specific and concrete cases the question presented by the Tenth Circuit's holding to see if any such conflict is perceived and thereafter resolved.

Moreover, the Petition should be denied because the Tenth Circuit has correctly construed sections 1962(a) and 1964(c) in "a common-sense, everyday understanding of RICO's language and Congress' gloss on it." *H. J., Inc. v Northwestern Bell Telephone Co.*, ___ U.S. at ___, 57 U.S.L.W. at 4954 (1989). Section 1962(a) "renders criminally and

civilly liable 'any person' who uses or invests income derived 'from a pattern of racketeering activity' to acquire an interest in or to operate an enterprise engaged in interstate commerce." *Id.* at 4951. That section does not, as Petitioner repeatedly suggests, make it unlawful to engage in racketeering acts or to receive racketeering income; rather, as the Tenth Circuit succinctly stated, "the statute prohibits a person who *has received* such income *from using or investing it* in the proscribed manner." 868 F.2d at 1149 (emphasis by the court). Thus, since section 1964(c) gives standing to assert a civil claim only to those who are injured "by reason of a violation of section 1962," it follows "from the plain language of these two provisions that a plaintiff seeking civil damages for a violation of section 1962(a) must plead facts tending to show that he was injured by the use or investment of racketeering income." *Ibid.*

Neither the district court nor the Tenth Circuit could find any allegations in Petitioner's complaint that he was injured by the use or investment of racketeering income. The Tenth Circuit's interpretation of sections 1962(a) and 1964(c) was correct; Petitioner's complaint was properly dismissed; and there is no reason to grant the requested writ.

That conclusion is unaltered by Petitioner's arguments that white collar crime is on the rise and a liberal interpretation of RICO is necessary to prevent corporations that engage in patterns of racketeering activity from slipping the RICO net. Petition for Writ of Certiorari pp. 12-16, 24-27. The Tenth Circuit's holding is neither liberal nor illiberal; it is reflective of "the legislative purpose . . . expressed by the ordinary meaning of the words used."

H. J., Inc. v. Northwestern Bell Telephone Co., ___ U.S. at ___, 57 U.S.L.W. at 4953 (1989) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). If a straightforward interpretation of RICO derived from a common-sense, everyday understanding of the statutory text leaves a hole in the net, then it is a legislative problem not a judicial one. As this Court most recently said, "RICO may be a poorly drafted statute; but rewriting it is a job for Congress, if it is so inclined, and not for this Court." *Id.*, ___ U.S. at ___, 57 U.S.L.W. at 4956.

2. No Conflict is Presented Among the Lower Courts by the Tenth Circuit's Correct Interpretation of RICO Sections 1962(d) and 1964(c).

Petitioner fails to cite *any* opinions which are in conflict with the Tenth Circuit's correct interpretation of RICO sections 1962(d) and 1964(c) that a failure to allege injury from a substantive RICO violation precludes a claim for conspiracy to commit such a violation. In both cases cited by Petitioner dealing with a claim for conspiracy under section 1962(d), the plaintiffs suffered injuries resulting from underlying substantive violations. *See Rice v. Janovich*, 109 Wash.2d 48, 742 P.2d 1230 (1987) (defendants convicted of criminal RICO violations and conspiracy to commit such violations); *Williams v. Hall*, 683 F.Supp. 639 (E.D. Ky. 1988)(the plaintiff's evidence, if believed, was sufficient to prove violation of §§1962(a) and 1962(c), which then gave rise to a claim under §1962(d)).

In *Nalle v. Oyster*, 230 U.S. 165 (1913), cited by Petitioner, this Court, regarding a claim for conspiracy to

commit libel, stated that since "the alleged libel was privileged and thus not actionable, it follows plainly enough that a conspiracy to publish it is not actionable." *Id.* at 183. Here, as reasoned by the District Court and the Tenth Circuit, since Petitioner failed to allege any injury from a substantive RICO violation, it "follows plainly enough" that he has likewise failed to show how the alleged conspiracy to commit that violation caused him injury.

Petitioner cites several other Circuit opinions dealing with the elements necessary to state a claim for civil conspiracy. However, none of these cases deals with section 1962(d) and none supports the proposition that it is unnecessary to allege injury from a substantive violation to support a claim for conspiracy to commit such a violation.

Because there are no circuit opinions which are in conflict with the Tenth Circuit's correct interpretation of section 1962(d),[1] the Petition for Writ of Certiorari should be denied.

---

[1] The Tenth Circuit has itself consistently interpreted section 1962(d) in relation to the substantive violations defined in subsections (a) through (c). *See Edwards v. First Nat. Bank, Bartlesville, Ok.*, 872 F.2d 347, 352 (10th Cir. 1989) ("[T]he conspiracy claim falls when the substantive claim . . . is deficient."); *Condict v. Condict*, 826 F.2d 923, 927 (10th Cir. 1987) (same); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 927 n.2 (10th Cir. 1987) (same).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

* * *

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

* * *